SUPREME COURT OF THE UNITED STATES

TERM, 1943

NO. [redacted] 12

JIM SKIDMORE, ET AL,
Petitioner and Appellant Below

vs.

SWIFT AND COMPANY,
Respondent and Appellee Below

PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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SUPREME COURT OF THE UNITED STATES

TERM, 1941

NO. _____

JIM SKIDMORE, ET AL.,
Petitioners

vs.

SWIFT AND COMPANY,
Respondent

PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

To the Honorable Harlan F. Stone, Chief Justice of the Supreme Court of the United States, and the Honorable Associate Justices of the Supreme Court of the United States:

Your petitioner, Jim Skidmore, et al, respectfully shows:

I.

STATEMENT OF MATTER INVOLVED

On March 28, 1941, your petitioner filed a complaint in the United States District Court for the Northern District of Texas, Fort Worth Division, against Swift and Company, and on June 20, 1941, W. W. Rousey, E. Phennell, H. Millican, R. Roark, Tom Dennis, and Ted Hayes filed as intervening plain-

tiffs. The suit was brought under the Fair Labor Standards Act of 1938, 52 Stat. 1060, also 29 U. S. C. A., Section 201, et seq, hereafter referred to as "the Act," in which petitioners sought to recover back wages alleged to be due them under the Act.

On the 9th day of December, 1941, the case was tried in the said District Court without jury, and with all facts stipulated and agreed to between the parties. (See Tr. pp. 36-56.) On August 1, 1941, judgment was rendered by the District Court in favor of the defendant, Swift and Company. Due notice was given for appeal to the United States Circuit Court of Appeals for the Fifth Circuit. It was submitted to the Court on May 19, 1943. On June 1, 1943, the Circuit Court for the Fifth Circuit rendered its judgment, affirming the finding of the District Court.

The facts in the case are completely set out in the Transcript of the Record, and there is no dispute of any question of fact involved in this case, since they were fully stipulated and agreed between the parties before trial in the District Court. (Tr. pp. 36 to 56.) Very briefly, the facts may be stated as follows:

The seven joint plaintiffs (petitioners herein) had for a number of years been employed by Swift and Company (respondent herein) in its meat-packing plant located in Fort Worth, Texas. The question of interstate commerce was admitted by the defendant in its answer; the applicability of the two year Statute of Limitation under Texas Law was admitted by plaintiff in open court; and all other matters of controversy were disposed of by pleadings, leaving only the question of whether the service performed by plaintiffs for

defendant was "work," and what "rate of pay" would apply if it were construed to be "work" for which overtime pay was due under the Act. The stipulated facts were that all seven employees worked during daylight hours for 44 hours per week, which was later reduced to 42 hours, and then to 40, as the maximum number of hours was reduced under the Act, as elevator operators and in general fire-prevention work. In addition to this day work, each of these plaintiffs (petitioners herein) was required (Tr. p. 37) to spend 3½ to 4 nights per week, according to a regular schedule (Tr. pp. 39 to 41 and 48 to 50), in the fire hall located at the defendant's plant. During these nights on duty, the plaintiffs had no particular duties to perform, but were required to remain in or near the fire hall to answer any alarms of fire or other casualty (Tr. p. 37). The stipulation reflects that there were very few alarms during the period in question. The stipulation shows that the plaintiffs were paid $27.00 to $29.00 per week for their regular work, but were paid nothing for nights on duty except on the occasion of answering an alarm at night plaintiffs were paid fifty cents, and later sixty-four cents, for each alarm, which usually took only fifteen to thirty minutes' time for each alarm (Tr. pp. 45, 52, 53). The stipulation reflects that plaintiffs did not live on the premises of the defendant, but rather that they maintained separate residences (Tr. p. 37).

The plaintiffs (petitioners herein) brought this action to recover pay for these nights spent by them in the defendant's (respondent herein) fire hall, claimed due them under the provisions of the Fair Labor Standards Act of 1938.

The trial court found for the defendant (respondent herein) on the ground that, since the employees had no particular duties to perform, except on the rare occasions when there was an alarm, the time they were required to remain on their employer's premises did not constitute "hours worked." This holding was affirmed by the Circuit Court on June 1, 1943.

Although the Circuit Court gave expression in its opinion to the effect that "the mere fact that a servant agreed to live on the place does not justify the conclusion that he is engaged in commerce, even though his employer may be." No finding was made that the employers were not engaged in commerce. Since the interstate character of employment was admitted by Swift and Company, both in its pleadings and in the agreed statement of facts (Tr. pp. 9 and 36), the mere reference by the Circuit Court does not give rise to that issue. Therefore, the identical issues are presented as were present in the trial of the case.

II.

JURISDICTION

(a) The jurisdiction of the United States Supreme Court to review this cause by writ of certiorari is granted in Judicial Code, Section 240, as amended by the Act of February 13, 1939, 43 Statutes 938, 28 U. S. C. A. 347 (a).

(b) The judgment of the United States Circuit Court of Appeals, from which writ of certiorari is requested, was rendered on June 1, 1943. This action is filed within the statutory time, being less than three

months from the final order of the court below, as is evidenced by the docketing and recording stamp of the Clerk of this Honorable Court.

(c) The decision of the court below involves the interpretation of a federal law which has not been, but should be, settled by this Court, and the decision rendered in this case on a federal question is probably in conflict with the applicable decisions of the Supreme Court of the United States. Wherefore, under Rule 38 (5)(b) of the Revised Rules of the Supreme Court of the United States, this discussion may be reviewed by this Honorable Court.

III.

PRINCIPAL QUESTIONS INVOLVED

(a) Where, as in the instant case, the plaintiffs were required by their employer to be present at certain hours of the night on certain days, according to a regular schedule prescribed by the employer, to answer emergency alarms of fire or other casualty, and during such periods the employees were not permitted to be elsewhere than on the premises of their employer, in readiness to perform such services, were they engaged in the service of their employer, and by such service were they in the *employ* of respondent, within the meaning of the Fair Labor Standards Act of 1938, governing such matters, and within the terms of their employment?

(b) Where the necessities of the employer, and the particular type of service to be exacted of the employees, as in this case, require the presence and at-

tendance of the employees on the premises of the employer, and where, but for such requirement, the employees would remain on their own premises and in their own residences, the fact that the employee is permitted by the employer to recreate himself, or sleep on the premises of the employer, except in such instances when emergency calls arise, is such time so spent by the employee on the premises of the employer "work" or "employ," within the meaning of the Fair Labor Standards Act of 1938; and where such time exceeds the statutory maximum hours of said Act, are such employees entitled to payment for overtime, and on bringing action are employees entitled to an additional equal amount as liquidated damages and reasonable attorney's fee, under the terms of the Fair Labor Standards Act of 1938?

(c) Inasmuch as it is undisputed that petitioners were employed by Swift and Company for daylight service, and that this service was extended into the night, by reason of which they were employed for a work-week beyond the forty-four hour limit, and, later, beyond the forty hour limit, and since, under the definition in Subdivision (g) of Section 3 of the Act, the term "employ" included "to suffer or permit to work," were appellants entitled to overtime pay calculated at one and one-half times the regular rate of pay which they were receiving for daylight work?

IV.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The decision of the court below involves the interpretation of a federal law which has not been, but should be, settled by this Court, and the decision rendered in this case on a federal question is probably in conflict with the applicable decisions of the Supreme Court of the United States. The federal statute involved in this decision is Section 7 of the Fair Labor Standards Act of 1938, 52 Statutes 1060, also 29 U. S. C. A., Section 207, which reads as follows:

> "No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—
>
> (1) for a workweek longer than forty-four hours during the first year from the effective date of this section,
>
> (2) for a workweek longer than forty-two hours during the second year from such date, or
>
> (3) for a workweek longer than forty hours after the expiration of the second year from such date,
>
> unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

In the judgment by the court below, the Court held that this section of the Fair Labor Standards Act did not apply to employees during periods of inactivity, although they were required to remain on the employer's premises. By this decision the Court exempted the coverage of the Fair Labor Standards Act of 1938 to that whole section of employees such as nightwatchmen, maintenance men, firemen, and other employees who are required by their employers to be on the premises ready for work, but who may have periods of inactivity and waiting. Thus, the decision of the court below in this case does not merely affect your petitioners, but can be cited as authority for exempting from the Act of Congress a great body of workers who, within the clear reading of the statute, were intended by Congress to come within the provisions of this Act. Therefore, there is involved here an important federal question which this Honorable Court should review within its powers as granted by statute.

WHEREFORE, your petitioners pray that a writ of certiorari issue under the seal of the Supreme Court of the United States, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said United States Circuit Court of Appeals for the Fifth Circuit had in this case, numbered and entitled on the docket, No. 10493, Jim Skidmore, et al, Appellants, versus Swift and Company, Appellee, to the end that this cause may be reviewed and determined by this Court, as provided for by the statutes of the United States; and that judgment

herein of said United States Circuit Court of Appeals be reversed by this Court; and for such further relief as to this Court may seem proper.

Dated this ..... day of ....., 1943.

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Jim Skidmore, et al.

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SUPREME COURT OF THE UNITED STATES

_____ TERM, 1943

NO. _____

JIM SKIDMORE, ET AL.,
Petitioners
vs.
SWIFT AND COMPANY,
Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

PREVIOUS OPINIONS

The opinion of the United States District Court for the Northern District of Texas, Fort Worth Division (Tr. pp. 26 to 33), is not officially reported. The opinion of the United States Circuit Court of Appeals for the Fifth Circuit, which was rendered on June 1, 1943, is not yet officially reported. (Tr. pp. 63-66.)

II.

JURISDICTION

(a) The jurisdiction of the United States Supreme Court to review this cause by writ of certiorari is granted in Judicial Code, Section 240, as amended,

by the Act of February 13, 1925, 43 Statutes 938, 28 U. S. C. A. 347 (a).

(b) The judgment of the United States Circuit Court of Appeals, from which writ of certiorari is requested, was rendered on June 1, 1943. This action is filed within the statutory time, being less than three months from the final order of the court below, as is evidenced by the docketing and recording stamp of the Clerk of this Honorable Court.

(c) The decision of the court below involves the interpretation of a federal law which has not been, but should be, settled by this Court, and the decision rendered in this case on a federal question is probably in conflict with the applicable decisions of the Supreme Court of the United States. The federal statute involved in this decision is Section 7 of the Fair Labor Standards Act of 1938, 52 Statutes 1060, also 29 U. S. C. A., Section 207, which reads as follows:

> "No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—
>
> (1) for a workweek longer than forty-four hours during the first year from the effective date of this section,
>
> (2) for a workweek longer than forty-two hours during the second year from such date, or
>
> (3) for a workweek longer than forty hours after the expiration of the second year from such date,
>
> unless such employee receives compensation for

his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

In the judgment by the court below, the Court held that this section of the Fair Labor Standards Act did not apply to employees during periods of inactivity, although they were required to remain on the employer's premises. By this decision the Court exempted from coverage of the Fair Labor Standards Act of 1938 that whole section of employees such as night-watchmen, maintenance men, firemen, and other employees who are required by their employers to be on the premises ready for work, but who may have periods of inactivity and waiting. Thus, the decision of the court below in this case does not merely affect your petitioners, but can be cited as authority for exempting from the Act of Congress a great body of workers who, within the clear reading of the statute, were intended by Congress to come within the provisions of this Act. Therefore, there is involved here an important federal question which this Honorable Court should review within its powers as granted by statute.

III.

STATEMENT OF THE CASE

The case is briefly stated in the petition which is printed with this volume, under heading "I" of the petition; therefore, for the sake of brevity, a statement of the case is not reprinted here.

IV.

SPECIFICATION OF ERRORS

(a) The Circuit Court erred in affirming the District Court, and erred in finding and holding that the time spent by your petitioners herein as employees in the fire hall of Swift and Company, the respondent herein, during which time they were subject to call at any minute to answer fire alarms or other casualty, did not constitute "hours worked," for which overtime compensation is due, under the terms of the Fair Labor Standards Act of 1938.

(b) The Circuit Court erred in affirming the District Court, and erred in failing to direct the District Court to enter a judgment for your petitioners, requiring Swift and Company to pay them for overtime work, calculated at time and one-half their regular rate of pay, the regular rate of pay being $27.00 to $29.00 for 40 to 44 hours of daylight work each week, inasmuch as the evidence which was stipulated and agreed to between the parties discloses that your petitioners, as employees for Swift and Company, were required by Swift and Company to remain each work-day and continue in the service of Swift and Company beyond and in excess of the 44 hours, and later 40 hours, per week, for which they were paid nothing, except in the event of answering an occasional fire alarm, for which they were paid 50 cents, and later 64 cents, for each alarm answered; and for an equal amount as liquidated damages; and for their attorney's fees, as provided for in the Fair Labor Standards Act of 1938.

V.

SUMMARY OF ARGUMENT

All matters of fact were stipulated and agreed to between the parties. There was no dispute that the petitioners, as employees of the respondent, were required, in addition to 40 to 44 hours per week as elevator operators or general relief men, to spend 54 to 56 hours per week at night in the respondent's fire hall, located at the plant site of the respondent's packing plant in Fort Worth, Texas. There are only two questions involved in this case, both questions of law: (1) whether or not those 54 to 56 hours per week spent in the fire hall were hours spent in the "employ" of the respondent within the meaning of the Fair Labor Standards Act of 1938; and (2) the question of determining what the regular hourly rate of pay was, for the purpose of computing overtime at time and one-half the regular rate of pay. The Supreme Court of the United States has not passed on either of these questions as they arise under the Fair Labor Standards Act of 1938; however, in cases which are cited below, the Supreme Court has rendered decisions in questions involving the meaning of "work" under the very closely related statute in the Hours of Service Act, 45 U. S. Code 61. In these decisions, the Supreme Court has laid down the principle that an employee may be working during periods of inactivity, but when he is under orders of his employer, and not at liberty to go away from the premises. The Supreme Court has also spoken concerning the computation of rate of pay, which is a guide in this

case, in *Overnight Motor Transportation Co. v. Missel* (below), and in *Walling v. A. H. Belo Corporation* (below). In these cases, as is shown by the fuller argument below, the regular rate of pay is the rate at which an employee is actually employed under his employment agreement.

The Circuit Court rendered a decision in this case which involves an important question of federal law, in conflict with the principles heretofore laid down by the United States Supreme Court and the decisions rendered by other Circuit Courts.

SUMMARY

POINT (a). The decision of the Circuit Court involves an important question of federal law which has not been, but should be, settled by the Supreme Court of the United States.

POINT (b). The statute which is involved in this case is clear and unambiguous.

POINT (c). The Circuit Court in this case has decided an important federal question in a way probably in conflict with other applicable decisions of this Court.

ARGUMENT

POINT (a). The decision of the Circuit Court involves an important question of federal law which has not been, but should be, settled by the Supreme Court of the United States.

The question of what period of time an employee is engaged by an employer constitutes "work," within the meaning of the Fair Labor Standards Act of 1938, does not appear to have been heretofore considered by the Supreme Court of the United States in any of the cases in which this statute has been involved. This becomes a very important question in determining what amount is due an employee by the terms of the said Act. In the instant case, there is no dispute between the parties as to what hours the employees were required by their employer to be on duty. There was no question as to what the duties were during the various periods which the employees were required to remain on duty. The matter was presented to the trial court on an agreed statement of facts (see Tr. pp. 36-56). Very briefly, this record shows that the employees, your petitioners herein, worked 44 hours, and later 40 hours, per week on a daytime shift, from 7:30 a. m. to 4:30 p. m., 5 days per week, with one-half hour off for lunch. During this period they were employed as elevator operators and in general fire hall duties. Then, for a period of from 54 to 56 hours per week, your petitioners, as employees of Swift and Company, were required to spend the night in the fire hall on the premises of their employer. The stipulated facts show that the employees had other places of residence (Tr. p.

37), but that for four nights per week, and later 3½ nights per week, they were required, after their day duties in the plant, to return to the plant and spend the night at the plant. On these nights they were not privileged to leave the plant, but rather had to be on the premises, available in case of fire or other emergency (Tr. p. 37). For this night work the employees were paid 50 cents, and later 64 cents, for each alarm which they answered, but during the entire period involved there were only emergency calls on about thirty occasions (Tr. pp. 45, 53, 55).

The stipulation shows further that the employees were paid $27.00 each week for their regular work, and that the only pay they received for the nights which they spent in the fire hall was the 50 to 64 cents paid for each alarm answered.

Lower courts have heretofore considered cases in which a similar working arrangement was involved under the Fair Labor Standards Act of 1938.

In *Fleming v. Rex Oil & Gas Co.*, 43 Fed. Supp. 950, the court ruled on a case where employees had long periods of inactivity; in his ruling the court said:

> "For the purpose of determining overtime compensation due to oil pumpers of defendant in accordance with the Act, there should be included as hours worked by such pumpers not only the hours that such pumpers were actually engaged in manual labor, but also such hours as they were charged by the terms of the understanding between them and the defendant, with substantial responsibility for the successful operation of the pumps under their charge; and including also the

periods during which they were obliged to remain on or near the premises to enable them to carry such responsibility properly."

Recently, the Eighth Circuit Court, in considering the case of *Johnson v. Dierks Lumber Co.*, 130 Fed. (2d) 115, in which the Court considered for what part of an employee's time compensation was due, the Circuit Court, relying on *MK&T Ry. Co. v. United States*, (below) said:

> "We do not think the Act (Fair Labor Standards Act) means that an employer may claim all of an employee's time and compensate him for only a part of it. An agreement to pay for only a part of the hours which an employee is required to serve is invalid. The purposes of Congress in enacting the statute cannot be thus frustrated."

In the case of *Travis v. Ray*, 41 Fed. Sup. 6 (Western District of Kentucky), the Court was faced with facts analagous to the facts in the instant case, and in considering the question of what hours were work under the Fair Labor Standards Act, said:

> "I am of the opinion that the waiting periods between trips should be included in the total number of hours for which the plaintiff was employed. It is, of course, possible for an employer to make a number of independent contracts of employment, each one of which calls for employment at a different period of time, or to make one contract calling for separate and independent jobs at different times. Under such a contract, the time between the two working periods would not be includ d. But the present situation is not of that nature. Considering all of the circumstances sur-

rounding the numerous trips between Paducah and Gilbertsville, it is quite evident that the plaintiff was expected to be on the job from 1:15 p. m., when he reported for duty, until 2:00 a. m., when he finally put the bus in the garage and went home. Although he was not actually operating the bus every minute of this period, yet he had to hold himself available and be ready for duty when the schedule called for another run to be made. The bus was available to receive passengers during the interim. Most of the layover time was at Gilbertsville, which was merely a stopping point. It was neither the starting point of each day's run nor the final resting place of the bus when the day's work was over. There was no station-house at Gilbertsville; it was not where the plaintiff made his home. The waiting time was not long enough to permit him to go elsewhere or to engage in other activities. Minneapolis & St. L. Ry. Co. v. United States, 8 Cir., 245 F. 60. The evidence shows that it was at least an implied term of the contract that the plaintiff remain in the immediate vicinity of the bus in order to protect it and to take on the passengers who might arrive during the waiting interval. Performing the duties of a watchman, or being on duty subject to call if one's services should be required, is just as much employment in the legal sense of the term as actual labor. Missouri, K&T Ry. Co. v. United States, 231 U. S. 112, 34 S. Ct. 26, 58 L. Ed. 144; Chicago, R. I. & P. Ry. Co. v. United States, 8 Cir., 253 F. 555."

In the case of *Sunshine Mining Co. v. Carver*, 41 F. Sup. 60, the Court, in considering a similar question as to what hours were work, made the following statement:

"First, should the time spent in travel from the portal of the mine and descending to the usual place of work and returning to the portal be included in 'hours worked'? The answer under the evidence should be in the affirmative, for the place designated at the portal of the mine on its premises is the place where the workmen are to appear at a specified time. The workman offers himself there at a specified time and is under the control and direction of plaintiff who agrees to designate the place of work and the manner provided by it, and who created the situation necessary in operating its mine. It may be short distance or a long distance from the portal of the mine, therefore such travel time consumed from the time the workman appears at the portal of the mine and the travel time consumed to their designated place of work and the travel time consumed in returning to the portal of the mine should be considered and included in 'hours worked.' Employment of the workmen, under such circumstances, begins when they reach such entrance of the mine, as said by the Supreme Court in Bountiful Brick Company, et al, v. Giles, 276 U. S. 154; 48 S. Ct. 221, 222; 72 L. Ed. 507; 66 A. L. R. 1402."

In *Walling v. Sun Pub. Co.*, 47 F. Supp. 180, in considering hours when employees were on duty but had no particular tasks to perform, in a case which was brought under the provisions of the Fair Labor Standards Act, the Court held:

"The hours for which employees must be compensated at the standards prescribed in the Act include not only the hours that employees were actually engaged in manual labor, but also such

hours as they were obliged to remain on or near the premises to enable them to carry out the tasks for which they were responsible. In particular, the radio engineers are entitled to compensation for the periods they are on duty between the half-hourly meter readings when they are responsible for the successful operation of the apparatus or equipment under their charge."

Also, in *Walling v. Allied Messenger Service*, 47 F. Supp. 773, the Court said:

"Time spent by defendant's messenger employees in waiting for calls is time worked, and must be compensated for according to the provisions of the Act."

The trial court and the Circuit Court relied heavily on a statement taken from *Interpretative Bulletin No. 13 of the Wage and Hour Division (1941 Wage Hour Manual 144)*, which he set out in his Memorandum Opinion. We shall discuss this interpretation in light of the facts in the subject case. The Administrator says in the Interpretative Bulletin, Par. 7:

"In some cases employees are engaged in active work for part of the day but because of the nature of the job are also required to be on call for 24 hours a day. Thus, for example, a pumper of a stripper well often resides on the premises of his employer. The pumper engages in oiling the pump each day and doing any other necessary work around the well. In the event that the pump stops (at any time during the day or night) the pumper must start it up again."

"Similarly, caretakers, custodians, or watchmen

> of lumber camps during the off season when the camp is closed, live on the premises of the employer, have a regular routine of duty but are subject to call at any time in the event of an emergency. The fact that the employee makes his home at his employer's place of business in these cases does not mean that the employee is necessarily working 24 hours a day. In the ordinary course of events the employee has a normal night's sleep, has ample time in which to eat his meals, and has a certain amount of time for relaxation and entirely private pursuits."

All of this part of the interpretation depends on the employee's making "his home at his employer's place of business." In the case at bar there is nothing to indicate that the appellants made their homes at appellee's plant, but it is stated in the stipulation that "each of the plaintiffs * * * would say that he maintains a residence * * * ." There is no indication that appellants live at the appellee's plant, but rather that they were required to spend 4—later 3—nights a week away from their homes, as required by the appellee's schedule of work.

The facts in the case at hand are that appellants were required "to remain in the fire hall and stay in it, or within hailing distance." They were not free to "come and go." Had they been free to come and go, there would have been no occasion for them to stay at all. The plant was a place of duty, not of residence or domicile. There was no advantage for the employee to remain, and the premises were not those of refreshment or of recreation.

It appears then, after analyzing the facts in the case, that the Administrator's Interpretation does not support the finding of the courts below, and the courts erred in relying on it in hold that to remain at night on the premises of the employer did not represent "work."

While discussing the Interpretative Bulletin No. 13 of the Administrator of the Wage and Hour Division, we wish to call this Court's attention to paragraphs 2, 4, 5, 6, and 8 of the Bulletin:

> Paragraph 2. " * * * As a general rule, hours worked will include (1) all time during which an employee is required to be on duty or to be on the employer's premises, or to be at a prescribed work place, and (2) all time during which an employee is suffered or permitted to work, whether or not he is required to do so. * * * "
>
> Paragraph 3. " * * * Hours worked are not limited to the time spent in active labor, but include time given by the employees to the employer, even though part of the time may be spent in idleness. * * * "
>
> Paragraph 5. " * * * Ordinarily, periods of inactivity during which employees are on duty should be considered hours worked. * * * In these cases, the employee engages in active work intermittently, but his time is not his own while he remains conveniently available to carry out the instructions of his employer."
>
> Paragraph 6. "In a few occupations, periods of inactivity need not be considered as hours worked, even though the employee is subject to call. * * * In these cases, the nature of the employee's work involves long periods of inactivity which the em-

ployee may use * * * to carry on a normal routine of living. * * * *"

Paragraph 8. "In some cases, employees may be subject to call after the completion of their regular working day. * * * If the employee is required to remain on call in or about the place of business of the company, the time spent should be considered as hours worked. * * * *"

Taking the Interpretative Bulletin as a whole, and not picking out any isolated statement, there is not any reasoning which would relieve the appellee of its employment obligations in the case at hand. If the appellants had lived in company houses with their families, even on the premises of the appellee, or had the appellants been permitted to come and go, being subject to call when "off duty," it is probable that they could not be considered at work, but the facts show that they had to stay "in the fire hall, or within hailing distance" on a regular set schedule of hours,—not at home, but at the appellee's plant.

In citing the Interpretative Bulletin, we do so chiefly due to the reliance of the Courts below in its wording. The bulletin itself says that it is only a guide for the Administrator, "unless he is directed otherwise by authoritative rulings of the courts. * * * *" (Par. 1, I. B. 13.)

Under the Fair Labor Standards Act, a number of cases have been brought in federal courts in various parts of the United States on the question of whether or not watchmen were entitled to the benefits of the Fair Labor Standards Act of 1938. Although in most of these cases the question of "work" as we have it

here was not raised as an issue, it is called to the Court's attention that in these decisions the watchmen were considered entitled to the benefits of the Act. In the present case, the hours spent at night on duty in the fire hall at Swift and Company's packing plant in Fort Worth, Texas, can be compared to the service rendered by a watchman, in that they were present on the premises of the employer to protect his property in case of fire or other casualty. A few of the cases in which watchmen have been held to come within the scope of the Fair Labor Standards Act are: *Wood v. Central Sand & Gravel Co.*, 33 F. Supp. 40; *Lefevers v. General Export Iron & Metal Co.*, 36 F. Supp. 838; *Williams v. General Mills*, 39 F. Supp. 849; *Green v. Riss & Co.*, 45 F. Supp. 648; *Fleming v. A. B. Kirschbaum*, 316 U. S. 515. The Circuit Court by its decision would overthrow the application of the Act in all of these cases during periods when the employees were inactive.

The question of federal law decided by the Circuit Court in this case becomes an important federal question, since it involves the interpretation of a statute which affects a great body of employees through the whole of the United States. If this decision is permitted to stand, all of those employees—many of them among the most poorly paid groups—will be exempted from the overtime provisions of the Fair Labor Standards Act of 1938, which Congress intended for their protection. It is, therefore, requested by your petitioners that the Supreme Court exercise its power of review, to the end that all lower courts may be finally and completely directed as to what is meant by the word

"employ," within the meaning of the Fair Labor Standards Act of 1938.

POINT (b). The statute which is involved in this case is clear and unambiguous.

The question in this case involves the interpretation of Section 7 of the Fair Labor Standards Act of 1938 (below) which reads as follows:

> "Sec. 7 (a). No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—
>
> (1) for a workweek longer than forty-four hours during the first year from the effective date of this section,
>
> (2) for a workweek longer than forty-two hours during the second year from such date, or
>
> (3) for a workweek longer than forty hours after the expiration of the second year from such date,
>
> unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

The Circuit Court, in its opinion (Tr. p. 65), ignored completely the matter of service which your petitioners were rendering their employer, Swift and Company, but rather read into this section of the statute matters which are not there at all. The Court said:

"The Act does not require payment of wages to

> an employee merely because he is away from home. Nor does the Act undertake to regulate or restrict reasonable and bona fide agreements whereby an employee agrees to be available if needed. 'Working' is not synonymous with 'availability for work.'" (Tr. p. 65.)

The Court ignored the fact that the employee was rendering a service to his employer, and suffering inconvenience to himself.

Were this a proper interpretation of the statute, that service which was performed by any guard, nightwatchman, maintenanceman, or other employee who chiefly served his employer by being available in case of an emergency, but who is for long periods of time inactive, would be exempt from the coverage and application of this statute. Nowhere in the Act does Congress indicate that such was its intention. Rather, it was clear that Congress intended that any employee who comes within the coverage of the Act should be paid time and one-half his regular rate of pay for all hours worked in excess of the maximum hours set forth in the Act.

Your petitioners would further show that the statute clearly provides for the payment of overtime at time and one-half the regular rate of pay for overtime work. As to the payment of the amount of overtime in such cases, the United States Supreme Court, in *Walling v. A. H. Belo Corporation*, 86 Law Ed. 1166 (decided by the United States Supreme Court on June 8, 1942), recognized that it was necessary to look at the contract or employment practice, in order to determine the "regular rate" in each case presented. In upholding

the decision in that cause, as found by this Honorable Court, Mr. Justice Byrnes said:

> "In its initial stage the question to which this dispute gives rise is a question of law, a question of interpretation of the statutory term, 'regular rate.' But it is agreed that as a matter of law employer and employee may establish the 'regular rate' by contract."

Although Justice Reed wrote a long, dissenting opinion, in which he treated the "contract" in the Belo case as a fiction, he followed the majority opinion, and based the argument on the rule of law, as set out above,—that the "regular rate" may be established by contract. There is no disagreement between the rule laid down by the court in the Belo case and that laid down the same day by the Supreme Court in *Overnight Motor Transportation Co. v. Missel*, 86 Law Ed. 1159. This later case simply involves a situation where an employee was employed and working "by the week, with no agreement as to hours to be worked for a stipulated wage." The court held that in the absence of any contract or agreement, the "regular rate" was determined simply by dividing the total wage by the hours worked for each week.

There is ample evidence in the record of the instant case that the appellants were paid by the appellee for only 40 to 44 hours which they worked in the daytime and that all they were paid for their night work was the 50 to 64 cents which they were paid on the occasion of answering an alarm. The trial court in his findings found:

"(6) Plaintiffs were each paid a weekly salary running from $27.00 to $29.00 per week, and in addition, they were paid for answering fire alarms the sum of fifty cents for each alarm until January 1, 1940, and thereafter sixty-four cents for each alarm."

"(8) None of the plaintiffs worked in general fire hall duties, consisting of keeping in proper condition the plant fire-fighting equipment, etc., or as elevator operators or as relief men, more than the maximum 44 or 42 hours provided by the Act, but after October 24, 1940, when the 40 hour work week provision of the Wage and Hour Law became effective, there were a few occasions —about a dozen or more—during the entire period of time involved, when defendant paid, and one of the plaintiffs accepted additional compensation for work performed as elevator operators and relief men in excess of 40 hours per week, **at a rate equal to 68c per hour for each such excess hour,** and on a few holidays one of the plaintiffs was paid double time."

"Plaintiffs have been compensated at a lawful rate for all of their work in general fire hall duties, such as keeping on proper condition the plant fire-fighting equipment such as hose, sprinkler system, extinguishers and barrels, and as elevator operators and relief men." (Tr. p. 32.)

When these three findings are read together, it clearly appears that the trial court was treating the $27.00 to $29.00 weekly wage as pay for the daytime work which occupied the appellants for from 40 to 44 hours per week, and that the only pay for the nights which the appellants spent in the appellee's fire hall was the 50 to 64 cents which they were paid on the occasion of

answering an alarm at night. The overtime pay which the Courts below should have found in a judgment for the appellants should have been computed on a regular hourly rate of pay, determined by dividing the salary paid by the 40 to 44 hours daylight work.

That this was the actual hourly rate of pay of the appellants was established by the respondent itself during the course of the employment, as is shown by the record, in that on occasions when the appellants performed daylight work in excess of the 40-hour week, after October 24, 1940, they were paid at the rate of 68 cents per hour (Tr. p. 47); and it is further shown that this was the actual regular rate of pay by the evidence in the record that in weeks in which the employees worked in day duties as firemen or elevator operators as much as 48 hours per week, they were paid, instead of $27.00, $32.40, or at the rate of 67½ cents per hour (32.40 divided by 48) (Tr. p. 47). And it is further shown that the salary, even in the case of the two men who were occupied only in general fire hall duties, was for their daylight work as firemen. (See Explanation in Transcript, p. 55, which provides that the salary was paid, regardless of whether they worked 35, 40, 41, or 44 hours.).

Reference throughout the argument has referred to all of the appellants generally, not distinguishing one from another. Those references to extra pay for hours over 44-42-40 and to docking are not shown in the record to include appellants Millican and Dennis, but their inclusion in the argument is not with the intention of misleading the Court, but rather due to the fact that neither of these employees ever worked in their

daytime duties in excess of 44 hours per week (Tr. p. 55). Their entire record indicates that their schedule of hours,—that is, day work and time spent in the fire hall—is identical with that of the other appellants. We again call the Court's attention to the stipulation, "These men were paid their regular salaries, regardless of whether they worked 35, 40, 41, or 44 hours per week." (Tr. p. 55.) It is clear that their salaries were compensation only for the daytime work; that is, for the 41½ to 44 hours they worked as firemen, and was in no part pay for the night hours they spent in the fire hall,—50 to 58 hours per week. Therefore, their regular hourly rate of pay must be computed on the same basis as set out above, and for this reason no distinction has been made between any of the appellants in arguing this proposition. The record establishes that all appellants' regular rate of pay was from 61½ cents to 72½ cents per hour, as determined by the daylight hours worked during various periods of the petitioners' employment by respondent concerned in this cause.

There is no authority which would permit the computation of the regular rate of pay for the purposes of Section 7 of the Fair Labor Standards Act in any other way than outlined above.

The case at bar is analagous to the Belo case, supra, in that, although there was no written agreement, there was none-the-less the contract created by custom and practice, and under this agreement, the "regular rate" was established, not only on a weekly basis, but on an hourly and daily basis; that is, $27.00 to $29.00 for 40 to 44 hours day-work as "general fire hall men,"

or as "elevator operators and general relief men" (Tr. pp. 46-54); $5.40 per day (Tr. p. 43), and 64 cents (later 68 cents) per hour (Tr. p. 56). In addition, they were paid for their night duties, when answering alarms, 50 cents (later 64 cents) for each alarm answered (Tr. p. 45). There was no other pay for the night work, as far as this record can show. But in the District Court the appellee argued that, as a matter of law, if the court should find that the hours which appellants were required to be on duty at night was work for which appellants were entitled to overtime pay, then the Court should find that the $27.00 to $29.00 paid as salary should be construed to have covered the night hours worked also. But in the same argument the appellee said that this was not work, and that the appellants were paid in full at a legal rate for the 40 to 44 hours per week for their daytime work in "general fire hall duties" and "elevator operators and general relief men."

An employer cannot thus flee to the courts for protetcion to reduce the liability he may have incurred by refusing to recognize certain hours spent by his employees in service as work. In *Sklar Oil Corp. v. Thompson*, 126 Fed. (2d) 872, the Circuit Court for the Eighth Circuit held that where the records of the employer showed that a regular rate of pay was established for a definite number of hours worked per week, but that the employee had worked additional hours for which he had not been paid anything, that in computing overtime pay due for these hours, the regular established rate of pay was the basis for computation under the terms of the Fair Labor Standards Act,

—and a regular rate had been established. The Court said:

> "Its (appellant, Sklar Oil Corporation) only contention in this regard is that the flat salary employment precludes computation at an hourly rate. This contention, of course, falls away in the presence of appellant's own records."

There is no conflict between the Sklar case, supra, and the case of *Bumpus v. Continental Baking Co.*, 124 Fed. (2d) 548, in which the Sixth Circuit Court, in applying the "regular rate" in the absence of any agreement as to the hours to be worked for a weekly salary, held that an employer could not come in under the provisions of the statute and say that, since the pay was over the minimum provided by law, he had complied with the law. The Court said:

> "To lessen the regular rate of pay in interpretation, where in fact it was a rate established, would defeat this section (Section 7) of the Act."

The work performed by the employees (your petitioners) for Swift and Company at night was a part and a continuation of their daylight employment, and, as has been shown on the authority of the courts, such time is "work," for which employees are due pay, under the terms of the Fair Labor Standards Act. *Walling v. Sun Publishing Co.*, supra; *Walling v. Allied Messenger Service*, supra, and *Bountiful Brick Co. v. Giles*, supra. Such employment being work, then the Court erred in failing and refusing to find that appellants were entitled to judgment against appellee for all the hours worked at night; and, since the record shows

that the employees had been paid for the 40 to 44 hours per week which were the maximum hours under the statute, these night hours were overtime hours for which the court should have given judgment at time and one-half the "regular rate" at which the appellants were employed, or 61½ to 72 cents per hour.

POINT (c). The Circuit Court in this case has decided a federal question in a way probably in conflict with other applicable decisions of this Court.

In its opinion, the Circuit Court made no reference to any case which had been cited by either the appellant or appellee, nor to any previous decision by any other court (Tr. pp. 63-66). Rather, the Court shows as its only authority paragraph 6 of Interpretative Bulletin No. 13 of the Wage and Hour Division, supra, which makes reference to a switchboard operator in a small telephone exchange who has her bed alongside the switchboard, and has several hours of non-interrupted sleep. In using paragraph 6 of the Interpretative Bulletin, the Court failed to cite the full paragraph, and particularly made no reference to the last sentence of the paragraph, which concludes that the employee may "carry on a normal routine of living. * * * "

As was pointed out under Point (b) of this argument, when the whole Interpretative Bulletin is taken together, it is in no way authority for the opinion rendered by the Court, but rather is authority for reversing the opinion of the court below.

Although there are no cases of record in which the Supreme Court has considered the meaning of "work"

or "employment," within the meaning of the Fair Labor Standards Act of 1938, nonetheless, the Supreme Court has given expression to the meaning of "work" and of "employment" in cases arising under other statutes. The interpretation given these terms by the Circuit Court is in conflict and at variance with the interpretation given by the Supreme Court to these terms in the cases wherein that term was involved under other statutes; therefore, your petitioners would urge the Court that the decision rendered by the Circuit Court in this case is probably in conflict with applicable decisions of this Honorable Court.

Where the question of the meaning of "work" or "employment" has arisen, lower courts in rendering their decisions have made reference to *MK&T Ry. Co. v. United States* (231 U. S. 112, 34 S. Ct. 26). In *Fleming v. Rex Oil & Gas Co.*, supra, in *Travis v. Ray*, supra, in *Johnson v. Dierks Lumber Co.*, supra, in *Walling v. Sun Publishing Co.*, supra, and in *Walling v. Allied Messenger Service*, supra, the courts have all made reference to the *MK&T Ry. Co. v. United States* case. In this case the Supreme Court had under consideration the meaning of what constituted "work" under the Hours of Service Act, 54 U. S. Code 61, which Act makes it unlawful for a railroad to require or permit certain of its employees to be or remain on duty for more than 16 hours. In this case the Court said:

> "One of the delays was while the engine was sent off for water and repairs. In the meantime the men were waiting, doing nothing. It is argued that they were not on duty during this period, and that if it be deducted, they were not kept more

> than sixteen hours. But they were under orders, liable to be called upon at any moment, and not at liberty to go away. They were nonetheless on duty when inactive. Their duty was to stand and wait. United States v. Chicago, M&PS Ry. Co., 197 Fed. 624; United States v. Denver & RG Ry. Co., 197 Fed. 629."

In the case of *Sunshine Mining Co. v. Carver*, 41 F. Supp. 60, the District Court, in determining what period of time was "work" or "employment," under the terms of the Fair Labor Standards Act of 1938, cited United States Supreme Court decision in *Bountiful Brick Co. v. Giles*, 270 U. S. 154, in which the Court in a liability action determined what periods an employee was in the "employment" of his employer; the Supreme Court said:

> "In other words, the employment may begin in point of time before the work is entered upon, and in point of space before the place where the work is to be done is reached. Probably, as a general rule, employment may be said to begin when the employee reaches the entrance to the employer's premises where the work is to be done."

It is very clear from the expression given by the Supreme Court in these two cases that the meaning of "work" or "employment" goes further than the actual manual or mental labor, but is that service which is rendered by an employee to his employer, or is that period of time which is spent by an employee for the benefit or service of his employer, as distinguished from the period which is wholly and completely at the disposal of an employee.

Your petitioners would respectfully urge this Court that the Circuit Court in its decision in the instant case rendered its judgment contrary to the probably applicable decisions of this Honorable Court.

VI.

CONCLUSION

In way of conclusion, your petitioners would cite the propositions which were submitted to the Circuit Court of Appeals, which that Court, by its decision, held to be false propositions:

(a) Where, as in the instant case, the plaintiffs were required by their employer to be present at certain hours of the night on certain days, according to a regular schedule prescribed by the employer, to answer emergency alarms of fire or other casualty, and during such periods the employees were not permitted to be elsewhere than on the premises of their employer, in readiness to perform such services, they were engaged in the service of their employer, and such service represented work, within the meaning of the Fair Labor Standards Act of 1938, governing such matters, and within the terms of their employment.

(b) Where the necessities of the employer, and the particular type of service to be exacted by the employees, as in this case, require the presence and attendance of the employees on the premises of the employer, and where, but for such requirement, the employees would remain on their own premises and in their own residences, the fact that the employee

is permitted by the employer to recreate himself, or sleep on the premises of the employer, except in such instances when emergency calls arise, such time so spent by the employee on the premises of the employer is work, within the meaning of the Fair Labor Standards Act of 1938, and where such time exceeds the statutory maximum hours of said Act, such employees are entitled to payment for overtime, and on bringing action employees are entitled to an additional equal amount as liquidated damages and reasonable attorney's fees.

(c) Inasmuch as it is undisputed that appellants were employed by Swift and Company for daylight service, and that this service was extended into the night, by reason of which they were employed for a workweek beyond the forty-four hour limit, and, later, beyond the forty hour limit, and since, under the definition in Subdivision (g) of Section 3 of the Act, the term "employ" included "to suffer or permit to work," appellants were entitled to overtime pay calculated at one and one-half times the regular rate of pay which they were receiving for daylight work."

Not only have the courts below, in their opinions, given expression to this important federal law contrary to applicable decisions of other lower courts and of this Court, but by their decisions they have taken away an important sector of federal legislation enacted by the Congress which guaranteed to working men that they would be paid reasonable compensation for long hours of service, and which guaranteed to the Nation that employment would not be curtailed during periods of depression by the expediency of extending hours